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No. 07-146

In the Supreme Court of the United States

DON JONES; VJ-2 DEVELOPMENT, INC.,
an Oregon corporation,
Petitioners,

v.

CITY OF McMINNVILLE, OREGON,
an Oregon municipal corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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Respondent City of McMinnville ("the City") respectfully requests that this Court deny the petition for certiorari ("petition") filed by petitioners Don Jones and VJ-2 Development, Inc., seeking review of the unpublished opinion of the Ninth Circuit Court of Appeals entered in this case on May 9, 2007.

This case is unsuitable for review because petitioners' arguments amount to nothing more than a quarrel with the outcome in this case. The case presents no important federal question for resolution by this Court. Sup. CT. R. 10. In addition, petitioners misstate the facts in several regards and rely upon unpreserved arguments.

I. STATEMENT OF THE CASE

The unsuitability of this case for Supreme Court review is apparent from petitioners' seven-page factual recital, presented at pages three through nine of their petition under the heading "The Case." This Court has long made clear that it does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497, 69 L. Ed. 925 (1925).

Although the City understands that this Court is not in the business of reviewing facts, petitioners' recital presents a false picture of this case and requires correction. The City objects to petitioners' statement of facts to the extent that it relies upon the affidavit of Don Jones. (App. 166-172).[1] The

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[1] References to "App." are to the appendix attached to the petition for certiorari. References to "E.R." and "S.E.R." are to petitioners' excerpt of record and the City's supplemental excerpt of record filed with their Ninth Circuit Briefs. References to "C.D." are to the clerk's docket.

district court granted the City's motion to strike most of that affidavit on evidentiary grounds (App. 25, 320-328), and the Ninth Circuit Court of Appeals upheld this ruling. (App. 6). Petitioners do not challenge that ruling here.

Further, much of petitioners' statement of facts relies upon petitioners' concise statement of material facts. (App. 296-305). Most of that document, however, was contested or objected to by the City. (C.D. 50). For instance, petitioners assert that "the Mayor and City Council speeded other similarly situated annexation applications through to final approval just before" passage of the charter amendment requiring citizen approval of annexations. (Pet. 6). To the contrary, the City's response to petitioners' concise statement cites evidence that all applicants were treated the same and points out that the exhibits relied upon by petitioners do not support their position. (C.D. 50, p. 4). The City adopts and relies upon its responses and objections to petitioners' concise statement of material fact in so far as they are relevant to petitioners' statement of the case.

The City disagrees with the characterizations in the first paragraph of petitioners' statement of the case. (Pet. 3). The City acknowledges that both the Planning Commission and the City Council approved each of petitioners' annexation requests. The City, however, does not now agree and has not previously agreed that petitioners were "wronged." Petitioners' requests were simply denied by a legal vote of the City's citizens.

Following is a recital of the facts relevant to petitioners' arguments.

Pursuant to the City's Urban Growth Boundary Management Agreement ("UGB Agreement") with Yamhill

County, development of urban uses on lands designated Future Urbanizable Land must be preceded by annexation of the land to the City, and annexations are to occur in accordance with the City's Comprehensive plan and the procedures set out in the City's annexation ordinance. (S.E.R. 41).

On May 21, 1996, the citizens of McMinnville passed a ballot measure directing that the City Charter be amended to require that all annexations of land to the City, except those required by state law, be approved by a majority of City voters. (S.E.R. 60). The charter amendment was initiated and promoted by a local land use group, which began its signature campaign after the City declined the group's request that the City pass an ordinance amending the charter. (S.E.R. 35). There is no evidence that the City supported the initiative campaign.

Petitioner Jones acknowledges that petitioners have no evidence that the Charter amendment was proposed and passed in order to harm them or to establish that the Charter amendment was related to their proposed annexations or intended to prevent them from developing the subject property. (App. 162; S.E.R 14, 18). Jones' only basis for his conclusion that the passage of the Charter amendment was a pattern or practice of the City to harm him was the fact that he was harmed. (S.E.R. 14).

After the ballot measure passed, the City implemented it by ordinance. (S.E.R. 60-67). Petitioners' assertion that "[t]he City * * * adopted a City Charter Amendment to prevent annexations without an approval vote of the City's citizens" (Pet. 4) leaves out the fact that the City was required to adopt the charter amendment by the passage of the ballot

measure.[2] Further, there is no evidence to support petitioners' statement that prior to the passage of the charter amendment, the City wrongfully induced petitioners to delay the filing of their annexation application until after the passage of the charter amendment. (*Id.*).

Petitioner Jones is the sole owner of and spokesperson for VJ-2 Development, Inc. ("VJ-2"), which purchased property located outside the city limits but inside the UGB in 1994. (App. 49, 50, 156). The City is aware of no evidence (other than the stricken Jones affidavit) supporting petitioners' statement that "[b]y the time Petitioners acquired their property, the City had extended water and sewer lines out to the property specifically designed to accommodate future urban development of this UGB property." (Pet. 4). In any event, if services had already been extended to the property, there would have been no reason for petitioners' June 11, 2003 request to have services extended to their property.

Prior to the passage of the Charter amendment, VJ-2 submitted an annexation proposal which was approved by the City's Planning Commission. (S.E.R. 1). Petitioners then withdrew part of their application, and because the City Council did not wish to consider petitioners' plans piecemeal, it legislatively denied the annexation, stating that it would consider the annexation once petitioners' total master plan was submitted. (*Id.*). Jones acknowledges that petitioners have no reason to believe that the Council made the request for improper reasons, to delay the processing of the application until the Charter amendment had passed, or to

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[2] Petitioners' recital of criticisms of voter-approval for annexations (Pet. 4-5) does not change the fact that voter-approval is called for by a City ordinance and is not prohibited by statute.

intentionally harm them. (S.E.R. 15). The ballot measure requiring the Charter amendment was approved before petitioners submitted their master plan. (S.E.R. 60-67).

Between 1996, and 2000, VJ-2 submitted four separate proposals for annexation of the property. (App. 51, 52, 182). The City approved all of these annexation requests. (App. 51-52).[3] The annexation requests were submitted to the citizens for a vote, and all four were denied by the voters. (S.E.R. 17). Jones has no evidence that the City attempted to influence the vote on any of the proposed annexations. (S.E.R. 14). Jones knows of no situation in which the City approved an annexation after rejection by the voters or treated any developer differently than him after the voters had rejected a proposed annexation. (S.E.R. 18).

After portions of petitioners' property were acquired by the McMinnville School District and developer Alan Ruden, these parties were successful in obtaining voter approval of annexation of their property. (S.E.R. 30, 77-93; App. 133-134).

In 2003, petitioners submitted a request to the City Council to extend public facilities and services outside the City's boundaries to a portion of their property, and to modify the UGB Agreement to allow such an extension and to allow development of the property at urban densities despite its not being incorporated into the City. (S.E.R. 16; App. 182-184). The City Council unanimously denied the request. (S.E.R. 4, 16). The City's comprehensive plan expressly prohibits the

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[3] Petitioners assert that they submitted ten separate annexation requests. (Pet. i, 5). Petitioners apparently refer to resubmissions. Petitioners' complaint lists four annexation requests. App. 51-52).

extension of urban services to unincorporated areas for the purpose of urban development. (S.E.R. 52-53). The City has never extended urban services outside of its boundaries and into the UGB area for the purposes of connecting unincorporated properties (S.E.R. 31) or allowed approval of urban development on unannexed land inside the UGB. (S.E.R. 23, 33). Where the City has placed sewer lines and other infrastructure in areas outside city limits but within the UGB, it has done so only to serve parcels located within city limits. (S.E.R. 33). Jones acknowledges that the decision by the City to deny his requests was not wrong, but he asserts that it was inconsistent with what he wanted to have happen. (S.E.R. 17).

II. REASONS FOR DENYING CERTIORARI

Review on a writ of certiorari is not a matter of right, and will be granted only for compelling reasons. Sup. Ct. R. 10. A review of the petition for certiorari reveals that petitioners are simply unhappy with the results in this case, and believe that it was decided incorrectly. Certiorari jurisdiction is "designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 276, n. 5, 101 S. Ct. 1673, 68 L. Ed.2d 80 (1981)(Stevens, J., concurring). Petitioners present no compelling reason for the grant of certiorari in this case.

A. The Ninth Circuit's Inverse Condemnation Ruling Presents No Basis For Review By This Court.

Petitioners assert that their inverse condemnation claim involves an important constitutional question. (Pet. 10). The only constitutional question presented, however, is a challenge pursuant to Article 1, section 18 of the Oregon

Constitution. Petitioners' federal inverse condemnation claim was dismissed as unripe by the district court. (App. 36-37). Thus, this claim presents no federal question, and is inappropriate for review by the Supreme Court.[4]

Petitioners argue that the Ninth Circuit's ruling on this issue conflicts with decisions of the Oregon Supreme Court, thus justifying "an exercise of tl s Court's supervisory power." (Pet. 11). This "supervisory power," however, is to be exercised where a "lower court has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure." Sup. Ct. R. 10. Petitioners have suggested no such departure. They have, at most, suggested a misreading of Oregon law, which is not a basis for review by this Court.

B. Even If Review Of The Inverse Condemnation Ruling Were Appropriate, The Ninth Circuit's Application Of Oregon Law Was Correct.

Petitioners argue that the Ninth Circuit applied the wrong rule in holding that "a compensatory 'takings" claim under the Oregon Constitution is allowed only if the state regulation 'is a step in a plan to acquire the property for public use.'" (Pet. 11). This is, in fact, a correct statement of Oregon law. *Dunn v. City of Redmond*, 303 Or. 201, 205, 735 P.2d 609 (1987); *Schoonover v. Klamath County*, 105 Or. App. 611, 614-615, 806 P.2d 156, *rev. den.*, 311 Or. 432 (1991). There is absolutely no evidence on the record that the

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[4] Petitioners' citation of federal cases (Pet. 12-13) demonstrates their fundamental lack of understanding that the question presented is strictly one of state constitutional law.

requirement that voters approve annexation was a step in a plan to acquire petitioners' property.

Further, even if petitioners were correct that the test is whether they were denied any economic use of the property (Pet. 12), there is no evidence supporting such a conclusion in this case. Finally, even if the district court and Ninth Circuit Court of Appeals had misconstrued the evidence, this would not be grounds for this Court to grant certiorari.

C. The Ninth Circuit's Equal Protection Ruling Presents No Basis For Review By This Court.

Petitioners attempt to interest the Court in this issue by asserting that the Ninth Circuit's decision "conflicts" with decisions of this Court and other state and federal courts. (Pet. 13). A review of petitioners' arguments, however, reveals that they have presented no conflict between courts on "an important federal question." Sup. Ct. R. 10. Instead, they seek error correction and factual reconsideration, neither of which is a proper function of this Court. Further, petitioners misrepresent the district court's reasoning and present an unpreserved question for review.

1. Petitioners Failed To Preserve Their Statute of Limitations Argument.

The district court held that petitioners's federal and state equal protection claims were both subject to a two-year statute of limitations. (App. 26, 29). Accordingly, the district court held that plaintiffs' equal protection claims were time-barred to the extent that they were based upon the denial of their annexation requests, and that only conduct arising from the City's denial of petitioners' request to extend public services facilities outside the City's boundaries would be considered.

(App. 26, 29). Petitioners did not challenge this ruling in their opening Ninth Circuit brief, but attempted to present a challenge in their reply brief, which the City moved to strike.

The Ninth Circuit did not rule on petitioners' motion to strike, but simply upheld the district court's ruling on the statute of limitations question. (App. 9-10). The City did not have an opportunity to address this issue before the Ninth Circuit, and the Supreme Court should, therefore, not consider petitioners' statute of limitations argument.

2. Even If Preserved, Petitioners' Statute Of Limitations Argument Lacks Merit.

The district court and Ninth Circuit correctly held that a two-year statute of limitations applied to petitioners' federal and state equal protection claims. *Sanok v. Grimes*, 306 Or. 259, 263, 760 P.2d 228 (1988)(Oregon's 2-year statute of limitations applies to section 1983 claims); *Medo-Bel Creamery v. State of Oregon*, 65 Or App. 614, 622, 673 P.2d 537 (1983)(2-year statute of limitations applied to state and federal equal protection claims); ORS 30.275(9)(creating two-year statute of limitations for any action arising from any act or omission of a public body or officer, employee or agent of public body).

Petitioners's reliance upon *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982) is unavailing. (Pet. 15). *Suess Builders* holds that a six-year statute of limitations applies to an inverse condemnation action. It says nothing about equal protection claims.

Further, even if petitioners were correct in their assertion that a six-year statute of limitations should have been applied, it would not be the function of this court to step in and correct

this error. In any event, application of a six-year statute of limitations would not further petitioners's cause. Application of a six-year limitation would do no more than allow consideration of the petitioners' claims based upon the denial of their annexation requests. The City approved all of these requests. It was the voters who disallowed them. Jones has acknowledged that he had no evidence that the City attempted to influence the vote on any of the proposed annexations and that he knows of no situation in which the City approved an annexation after rejection by the voters or treated any developer differently than him after the voters had rejected a proposed annexation. (S.E.R. 18). Thus, petitioners do not have an equal protection claim against the City based upon the denial of the annexation requests.

3. Petitioners' "Class Of One Argument" Includes An Incorrect Recital Of The District Courts' Ruling And Presents Nothing For This Court To Review.

Petitioners incorrectly state that the district court denied their equal protection claim on the ground that they were not part of a "suspect classification." (Pet. 14). Instead, the district court correctly ruled that "because plaintiffs do not belong to a suspect class, the court must apply a rational basis analysis to plaintiff's [equal protection] claim." (App. 28).

Petitioners' "class of one" argument presents no error, let alone a basis for review. Petitioners appear to believe that merely calling themselves a class of one will support an equal protection claim. (Pet. 14). An equal protection claim, however, may be successfully brought by a class of one only when the plaintiff can demonstrate a difference in treatment without a rational basis (federal law) or legitimate reasons related to the individual's situation (Oregon law). *Village of*

Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000); *State v. Clark*, 291 Or. 231, 239, 630 P.2d 810, *cert. den.*, 454 U.S. 1084 (1981).

Both the district court and the Ninth Circuit held that there was a rational basis for the City's refusal to allow the extension of City services to petitioners' property. (App. 10, 28, 30). Petitioners' attempt to reargue the facts pertinent to these holdings before this court is inappropriate. (Pet. 17-18). In any event, most of petitioners' factual arguments relate to petitioners' annexation requests, and, as set forth above, the equal protection claim based upon these requests is time-barred and without merit.

D. The Ninth Circuit's Due Process Ruling Presents No Basis For Review By This Court.

Once again, petitioners attempt to interest the Court in this issue by asserting a conflict with decisions of this Court (Pet. 19), and, once again, petitioners fail to present any actual conflict. Instead, the most that petitioners present is an argument that the issue was wrongly decided. This, by itself, is not grounds for granting certiorari. In any event, the issue was not decided incorrectly. Further, petitioners again present unpreserved questions for review.

1. Petitioners Failed To Preserve Their Statute of Limitations Argument.

Petitioners failed to preserve their argument that the wrong statute of limitations was applied to their due process claim by failing to raise it in their opening brief before the Ninth Circuit. The Ninth Circuit affirmed the district court's ruling that a two-year statute of limitations applied to the due process claim without ruling on the City's motion to strike

this argument from petitioners' response brief. (App. 11). The Court should not consider this argument because the City did not have an opportunity to address it before the Ninth Circuit.

2. Even If Preserved, Petitioners' Statute Of Limitations Argument Lacks Merit.

The City relies upon the arguments in section C.2. above.

3. Petitioners Failed To Preserve Their Argument That They Are Entitled To Bring A Due Process Claim In Addition To Their Equal Protection And Takings Claims.

Petitioners' opening brief in the Ninth Circuit failed to challenge the district court's ruling that petitioners were precluded from asserting a substantive due process claim where they had asserted an equal protection claim based upon the same facts. (App. 31). Petitioners attempted to address this issue for the first time in their reply brief, and the City moved to strike the argument. The Ninth Circuit ruled against petitioners on this issue without addressing the City's motion to strike. (App. 11). This Court should not accept review of this issue which the City did not have an opportunity to address in the Ninth Circuit.

4. Even If Preserved, Petitioners' Argument On Their Entitlement To Bring A Due Process Claim Presents No "Conflict" With This Court's Jurisprudence And Is Based Upon A Misreading Of The Ninth Circuit's Opinion.

The Ninth Circuit held that "substantive due process claims are barred where the claimant could seek equivalent

relief under constitutional provisions that provide more specific guarantees," and affirmed the district court's dismissal of the due process claim because petitioners' "federal substantive due process claim merely restates their takings and equal protections claims." (App. 11-12). Petitioners misstate the Ninth Circuit's ruling, quoting the Ninth Circuit's recital of the holding of *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir 1999), which was addressed specifically to takings claims, rather than quoting the Ninth Circuit's actual holding set forth above. (Pet. 21; App. 11).

Petitioners assert that the Ninth Circuit's rule on this issue is "in direct conflict with the decisions of this Court and other circuit courts that allow litigation for separate constitutional violations including substantive due process, equal protection violations and "taking" of property without just compensation, particularly where the related remedies are different." (Pet. 19). The cases cited by petitioners, however, are not in conflict with the Ninth Circuit's ruling in this case. Neither *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) nor *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996) (Pet. 20) addresses or rules on the question of whether a party may bring both a general substantive due process claim and a more specific constitutional claim. In *Rolf*, the Fifth Circuit entertained both equal protection and First Amendment retaliation claims. The court noted in a footnote that because the First Amendment is made applicable to the states through the Fourteenth Amendment's due process clause, the First Amendment retaliation claim "may be characterized as a 'substantive due process claim.'" 77 F.3d at 827, n. 18. The First Amendment, however, provides specific protections, and the plaintiff in *Rolf* was not seeking to add a general due

process claim to his more specific equal protection claim as is the case here.

Petitioners also assert that they have been "forced to return ownership to their sellers of a portion of the restricted property (thereby inverse condemnation not being a complete remedy)." (Pet. 19). First, there is no evidence that petitioners' were "forced" to return ownership to the sellers or that the City did anything to force such a return. Second, to the extent that petitioners are arguing that they are entitled to bring a due process claim because it will give them a remedy that is unavailable under their other constitutional claims, this is not the case. Petitioners sought economic damages for the their inverse condemnation, equal protection and due process claims. (App. 67). They sought identical damages for the equal protection and due process claims. (*Id.*).

5. Petitioners' Arguments On The Merits Of Their Due Process Claim Do Not Belong Before This Court.

Petitioners seek a ruling on the merits of their substantive due process claim. Such a ruling is not the function of this court. In any event, petitioners' arguments are without merit. First, petitioners' arguments are exclusively directed to their annexation proposals. Their due process claim based upon these proposals, however, is barred by the two-year statute of limitations. (App. 31). Second, their arguments are based upon their claim that there was a lack of standards for the annexation decisions. (Pet. 21-23). Again, the decision not to annex was made by the voters. Oregon does not require that voters follow "standards" in passing on an annexation that has been approved by a governmental body. Once the City has determined that the proposal meets land use

requirements, the voters make a separate "political" decision as to whether the land should be annexed, a decision that is not subject to land use requirements. *Bear Creek Valley Sanitary Auth. v. City of Medford*, 130 Or. App.24, 880 P.2d 486, 489, *rev. den.* 320 Or. 493 (1994); *Dan Gile and Associates v. McIver*, 113 Or. App.1, 4-5, 831 P.2d 1024 (1992).

E. The Ninth Circuit's Antitrust Ruling Presents No Basis For Review By This Court.

Petitioners' assertion that the decision below conflicts with decisions of this court is wrong. (Pet. 24). Petitioners have pointed to no "conflict" on an important federal question requiring resolution by this court. Sup. Ct. R. 10(c).

1. The Ninth Circuit Did Not Misconstrue The Necessary Elements For State Action Immunity.

The Ninth Circuit correctly stated that a municipality is immune from federal antitrust liability where its actions restricting competition are authorized by state policy. (App. 7). *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)(to obtain exemption from antitrust liability, a municipality must demonstrate that its anticompetitive activities were authorized by state policy to replace competition with regulation or monopoly public). It is apparently petitioners' position that the Ninth Circuit's ruling on "state action immunity" is in conflict with this Court's decision in *Town of Hallie*. (Pet. 24). There is no conflict.

In *Town of Hallie*, the defendant city refused to supply sewage treatment services to neighboring towns, but supplied services to individual landowners in areas where landowners

voted to annex to the city and use the city's sewage collection and transportation services. The towns sued the city, alleging that the arrangement constituted, *inter alia*, an illegal tying arrangement. The Supreme Court held that because state statutes authorized the city to provide sewage services and empowered the city to refuse to serve unannexed areas, the state policy would foreseeably result in anticompetitive effects, thus, immunizing the city from antitrust liability. 471 U.S. at 41-43.

In the instant case, the Ninth Circuit held:

> "[T]he City was entitled to immunity from Appellants' federal antitrust claim: the State authorized the City to make annexation decisions and limit urban development and services to annexed land, and anti-competitive conduct is a foreseeable result of this broad grant of land use planning authority."

(App. 8). This holding follows, rather than conflicts with, the holding in *Town of Hallie*. Petitioners, nonetheless, assert that "this Court in *Town of Hallie* * * * did not limit the state statutory inquiry, as did the Ninth Circuit in this case, to only the initial enacting statute for governmental activity," and "did not require that the court must invariably conclude, regardless of the circumstances, that a broad mandate to act gives authority to prevent others from acting." (Pet. 24).

Regardless of whether a broad mandate to act gives authority to prevent others from acting, the Ninth Circuit did not, as asserted by petitioners, limit its inquiry to "the initial enacting statute for governmental activity." (Pet. 24). Instead, the Ninth Circuit held that the district court had "properly reviewed the relevant state statutes and correctly determined that they grant municipalities broad authority to

engage in comprehensive land use planning, zoning, and annexation." (App. 7). The district court cited several Oregon statutes in reaching its conclusion that the City was immune from antitrust activity. (App. 18-22). Thus, the Ninth Circuit affirmed a ruling based upon a comprehensive review of relevant Oregon statutes. Petitioners' attempt to create a conflict with the holding in *Town of Hallie* is unavailing.

2. Petitioners' "Sham" Argument Presents No Important Federal Question For Review By This Court.

Citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), petitioners assert that there is an exception to governmental immunity from antitrust litigation for a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor * * *." (Pet. 25). Even assuming that such an exception was applicable here, it would not be the function of this court to correct any "error" in the Ninth Circuit's failure to apply the exception.

In any event, the exception does not apply. It is apparently petitioners' position that the relationship between the City's mayor and Alan Ruden, a plumbing contractor falls within this exception. (Pet. 25-26). The exception, instead, applies where there is a publicity campaign, ostensibly directed toward influencing governmental action. 365 U.S. at 144. This case involves no such publicity campaign. In any event, there is no evidence on the record of a conspiracy between the mayor and Mr. Ruden. Further, it was the voters, not the City, that denied petitioners' annexation requests and allowed Mr. Ruden's request. Finally, even if

bad faith on the part of the mayor could be proven, the court could not consider such evidence because "subjective motivation plays no part *at any point* in determining whether state action immunity protects the conduct of municipalities." *Traweek v. City and County of San Francisco*, 920 F.2d 589, 592 (9th Cir.1990)(emphasis in original). Further, this Court has ruled that there is no conspiracy exception to state action immunity. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

F. The Ninth Circuit's Rulings On Petitioners' Remand and Abstention Motions Present No Basis For Review By This Court.

1. The Ninth Circuit's Decision On The Motion For Remand Presents No Question Of Interest Beyond This Case.

The question of whether this case should have been remanded to the trial court presents no important federal question and, indeed, no question of interest beyond this case. As such, it is unsuitable for Supreme Court review.

2. Even If The Remand Ruling Were Appropriate For Review, The Case That Petitioners Cite As Conflicting With The Ninth Circuit's Decision Was Not Raised Below And Does Not support Petitioners' Position. In Any Event, Petitioners Challenge A Non-Essential Portion Of The Ninth Circuit's Ruling.

The Ninth Circuit correctly set forth the two-part ripeness test for a federal regulatory takings claim: (1) a final decision by the government entity regarding the application of the

regulations to the property at issue, and (2) the claimant has sought compensation through the procedures provided by the State. (App. 2). *Williamson County Regional Planning Com'n, supra*, 473 U.S. at 194. The Ninth Circuit agreed with petitioners that their federal takings claim was not ripe under the second part of this test because petitioners had not sought just compensation for the alleged taking through available state procedures. (App. 3).

The Ninth Circuit also reiterated its past holding that although the first prong of the *Williamson* test is applicable to substantive due process and equal protection claims brought to challenge land use regulations, the second prong is limited to takings claims and their equivalents. (App. 4). The Ninth Circuit concluded that petitioners' due process claims (to the extent they were cognizable) and equal protection claim were not mere reformulations of their federal takings claim, and concluded that these were ripe. (App. 4). Petitioners contend that this holding is in direct conflict with *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981). This argument does not merit consideration by this court for several reasons. First, petitioners did not raise *Parratt*, below. Second, *Parratt* has no bearing on this case. In *Parratt*, this court held that a person alleging deprivation of property by a random and unauthorized act of a state employee did not state a due process claim unless or until the State failed to provide an adequate post-deprivation remedy.[5] *Parratt* says nothing about the ripeness of a due process claim

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[5] *Parratt* was later overruled to the extent that it recognized a due process claim based upon negligence. *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

in the land use setting, and nothing at all about equal protection claims.[6]

Finally, even if petitioners were correct in their assertion that the Ninth Circuit's ruling regarding the second prong of the *Williamson* test conflicts with *Parratt*, this ruling was not essential to the Ninth Circuit's decision. The Ninth Circuit's decision was based upon the ripeness of petitioners' due process, equal protection and antitrust claims. (App. 4). Petitioners raise no issue about the ripeness of their antitrust claim. Thus, the Ninth Circuit correctly affirmed the district court's decision not to remand the case.

3. Petitioners' Additional Arguments Raise Nothing For This Court's Consideration.

Petitioners argue that once the district court and Ninth Circuit ruled on their state taking claim, their federal taking claim became ripe. (Pet. 28). First, petitioners did not raise this argument below. Second, the City fails to understand how this argument is of assistance to petitioners. If their takings claim was ripe, there was no basis for a remand.

Petitioners further argue that the first prong of the *Williamson* test was not met because the City failed to make any decision on one of its annexation requests. (Pet. 28).

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[6] *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997) and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), cited by petitioners (Pet. 27) also fail to address the applicability of the two-part *Williamson* test to equal protection or due process claims.

Not only is this assertion unsupported by the record, but it is irrelevant. The *Williamson* test did not apply to petitioners' antitrust claim, which by itself provided a basis for federal jurisdiction. Petitioners' argument that the second prong of the *Williamson* test requires that state remedies be pursued in state court (Pet. 28-29) is irrelevant for the same reason.[7]

4. An Abstention Ruling Is Not A Proper Subject For Supreme Court Review.

Petitioners ask this court to review the Ninth Circuit's decision not to abstain from accepting jurisdiction in this case. (Pet. 29). Once again, petitioners are asking for review of a matter with no significance beyond this case, and review should be denied.

5. Even If The Abstention Ruling Were Appropriate For Review, There Was No Basis For Abstention In This Case.

Petitioners asked the Ninth Circuit to "abstain from accepting jurisdiction until the conclusion of state claims in the state proceeding." (Resp. Br. 8). There was, however, no state claim to be concluded because all of plaintiffs claims, including their state claims, had been ruled upon by the district court.

Further, this case raises no issue of first impression for the Oregon Courts. (Pet. 29). The Ninth Circuit correctly

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[7] In any event, petitioners' quotation from *Williamson* does not require that the state remedy be pursued in state court. It only requires that the state remedy be pursued prior to the federal takings claim.

ruled that "there is no unresolved issue of state law regarding the alleged conflict between the City's Charter Amendment, which allows the City's voters to veto proposed annexations, and Oregon's land use statutes, which require the City to comply with certain land use goals in making land use decisions." (App. 5). As noted by the Ninth Circuit, the Oregon Court of Appeals has held:

> "The decision by a city * * * that *proposes* an annexation is an act of planning that must comply with the land use laws; however, the subsequent acts that are necessary to finally adopt or reject the proposal, generally a popular vote under the ORS chapter 222 procedures, are not controlled by or subject to the land use laws."

Bear Creek Valley Sanitary Auth., supra, 130 Or. App. at 28-29 (emphasis in original). This ruling directly addresses the very question that petitioners assert has never been addressed by an Oregon court. (Pet. 29-30).

Neither *Dan Gile and Associates, supra*, nor *Cape v. City of Beaverton*, 187 Or. App. 463, 68 P.3d 261 (2003) (Pet. 30) supports petitioners' position or suggests that this case poses a question of first impression under Oregon law. In *Dan Gile,* the Oregon Court of Appeals ruled that a referendum could not be held on a zoning change, because this was a legislative land use decision. 113 Or. Ap. at 5-6. The court distinguished annexation cases because those entail two decisions– a land use decision by the governing body and a political decision by the electorate. 113 Or. App. at 5. *Cape* held that a governing body's annexation decision was a land use decision. There was no citizen vote involved. Thus, the *Bear Creek* ruling controls and answers the question

posed. There was no basis for abstention by the Ninth Circuit.

III. CONCLUSION.

For all of the above reasons, petitioners' petition for certiorari raises no issues suitable for consideration by this Court and should be denied.

Dated this 24th day of August 2007.

Respectfully submitted,

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